KOPERASI JIMAT CERMAT DAN PINJAMAN KERETAPI BHD

v.

KUMAR GURUSAMY

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
[CIVIL APPLICATION NO: 08()-255-2010(W)]
22 FEBRUARY 2011

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Application for leave to appeal against decision of Court of Appeal - Matter originated from Co-operative Tribunal under Co-operative Societies Act 1993 - Whether High Court exercising its original or appellate jurisdiction in an appeal from Co-operative Tribunal - Whether application came within ambit of s. 96(a) Courts of Judicature Act 1964 - Co-operative Societies Act 1993, s. 83(7) - Rules of the High Court 1980, O. 55 r. 13 - Courts of Judicature Act 1964, s. 96(a)*

CIVIL PROCEDURE: *Appeal - Leave to appeal - Application for leave to appeal to Federal Court against Court of Appeal's decision - Matter originated from Co-operative Tribunal under Co-operative Societies Act 1993 - Whether High Court exercising its original or appellate jurisdiction in an appeal from Co-operative Tribunal - Whether application came within ambit of s. 96(a) Courts of Judicature Act 1964 - Co-operative Societies Act 1993, s. 83(7) - Rules of the High Court 1980, O. 55 r. 13 - Courts of Judicature Act 1964, s. 96(a)*

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Application for leave to appeal to Federal Court against Court of Appeal's decision - Matter originated from Co-operative Tribunal under Co-operative Societies Act 1993 - Whether High Court exercising its original or appellate jurisdiction in an appeal from Co-operative Tribunal - Whether application came within ambit of s. 96(a) Courts of Judicature Act 1964 - Co-operative Societies Act 1993, s. 83(7) - Rules of the High Court 1980, O. 55 r. 13 - Courts of Judicature Act 1964, s. 96(a)*

UNINCORPORATED ASSOCIATIONS: *Societies - Co-operative society - Application for leave to appeal to Federal Court against Court of Appeal's decision - Matter originated from Co-operative Tribunal under Co-operative Societies Act 1993 - Whether High Court exercising its original or appellate jurisdiction in an appeal from Co-operative Tribunal - Whether application came within ambit of s. 96(a) Courts of Judicature Act 1964 - Co-operative Societies Act 1993, s. 83(7) - Rules of the High Court 1980, O. 55 r. 13 - Courts of Judicature Act 1964, s. 96(a)*

The applicant was a co-operative society, and the respondent its Vice President until the applicant terminated his membership. The respondent commenced action against the applicant in the Co-operative Tribunal ('Tribunal'), established under s. 83(1) Co-operative Societies Act 1993 ('CSA'). The Tribunal found that the termination of the respondent's membership was in breach of the rules of natural justice and ordered that it be reinstated. Aggrieved, the applicant appealed to the High Court. The High Court allowed the applicant's appeal and set aside the Tribunal's award. The respondent subsequently appealed to the Court of Appeal, which allowed said appeal. Hence, the applicant filed encl. 2(a) for leave to appeal to this court against the Court of Appeal's decision. The respondent, however, raised a preliminary objection by way of encl. 5(a) to strike out encl. 2(a). The issue for consideration was whether the High Court, in an appeal from the Tribunal under the CSA, was exercising its original or appellate jurisdiction.

Held (striking out encl. 2(a) with costs)
Per Arifin Zakaria CJ (Malaya) delivering the judgment of the court:

(1) If a decision of the High Court does not arise from the exercise of its original jurisdiction, it will not fall within the ambit of s. 96(a) Courts of Judicature Act 1964 ('CJA') and will not be appealable to the Federal Court. In the present case, the appeal by the applicant to the High Court was made pursuant to s. 83(7) CSA and instituted by way of originating motion under O. 55 r. 13 Rules of the High Court 1980. The matter thus came before the High Court by way of an appeal and it followed that this application could not come within the ambit of s. 96(a) CJA. The preliminary objection in encl. 5(a)

was, therefore, upheld. *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* (foll); *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd* (foll). (paras 9, 17 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon adalah sebuah koperasi, dan responden Naib Presidennya sehingga pemohon menamatkan keahliannya. Responden memulakan tindakan terhadap pemohon dalam Tribunal Koperasi ('Tribunal'), yang ditubuhkan di bawah s. 83(1) Akta Koperasi 1993 ('AK'). Tribunal mendapati bahawa penamatan keahlian responden telah melanggar kanun-kanun keadilan semulajadi dan mengarahkan bahawa ia dikembalikan semula. Terkilan, pemohon merayu ke Mahkamah Tinggi. Mahkamah Tinggi membenarkan rayuan pemohon dan mengenepikan award Tribunal. Responden kemudiannya merayu ke Mahkamah Rayuan, yang membenarkan rayuan tersebut. Oleh itu, pemohon memfailkan Lampiran 2(a) menuntut kebenaran untuk merayu ke mahkamah ini terhadap keputusan Mahkamah Rayuan. Responden, walau bagaimanapun, menimbulkan bantahan awalan melalui Lampiran 5(a) untuk membatalkan Lampiran 2(a). Isu untuk ditimbang adalah sama ada Mahkamah Tinggi, dalam rayuan dari Tribunal di bawah AK, melaksanakan bidangkuasa asalnya atau rayuannya.

Diputuskan (membatalkan Lampiran 2(a) dengan kos)
Oleh Arifin Zakaria HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Jika suatu keputusan Mahkamah Tinggi tidak bangkit dari pelaksanaan bidangkuasa asalnya, ia tidak termasuk dalam lingkungan s. 96(a) Akta Mahkamah Kehakiman 1964 ('AMK') dan tidak dapat dirayu ke Mahkamah Persekutuan. Dalam kes semasa, rayuan oleh pemohon ke Mahkamah Tinggi telah dibuat mengikut s. 83(7) AK dan dimulakan melalui usul pemula di bawah A. 55 k. 13 Kaedah-Kaedah Mahkamah Tinggi 1980. Perkara tersebut oleh itu dihadapkan di Mahkamah Tinggi melalui suatu rayuan dan ia bererti bahawa permohonan ini tidak termasuk dalam lingkungan s. 96(a) AMK. Oleh yang demikian, bantahan awalan dalam Lampiran 5(a) dibenarkan. *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* (diikuti); *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd* (diikuti).

Case(s) referred to:
Auto Dunia Sdn Bhd v. Wong Sai Fatt [1995] 3 CLJ 485 FC ***(refd)***
Healey v. Ministry of Health [1954] 2 All ER 449 CA ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No: 08-31-99(S)) (Unreported) ***(foll)***
Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor [1981] 1 CLJ 83; [1981] CLJ (Rep) 74 FC ***(refd)***
Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 ***(foll)***

Legislation referred to:
Co-operative Societies Act 1993, ss. 4, 83(1), (5), (7)
Courts of Judicature Act 1964, ss. 3, 96(a)
Federal Constitution, art. 128(3)
Rules of the High Court 1980, O. 53, O. 55 r. 13
Subordinate Courts Act 1948, s. 3

For the applicant - K Shanmuga; M/s Kanesalingam & Co
For the respondent - N Chandran (Ranjan Chandran with him); M/s Ranjan Chitravathy & Nik

[Editor's note: For the Court of Appeal judgment, please see Kumar Gurusamy v. Koperasi Jimat-Cermat Dan Pinjaman Keretapi Bhd [2011] 1 CLJ 318.]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria CJ (Malaya):

Introduction

[1] There are two applications before us namely: encls. 2(a) and 5(a). These applications were fixed for hearing on 29 November 2010. Enclosure 2(a) is an application for leave to appeal to this court against the decision of the Court of Appeal, while encl. 5(a) is a preliminary objection by the respondent to strike out the application in encl. 2(a).

[2] In this judgment we shall deal with the preliminary objection raised herein. For this purpose, we shall briefly state the facts and the circumstances leading to the application in encl. 5(a). The

applicant, at all material time, is the cooperative society registered under s. 4 the Co-operative Societies Act 1993 ("the CSA"). The respondent was the Vice President of the co-operative society until his membership was terminated by the applicant. He commenced action against the applicant in the Co-operative Tribunal, established under s. 83(1) of the CSA ("the tribunal"), challenging the validity of his termination. The tribunal found that the termination of his membership was made in breach of the rule of natural justice and ordered that the respondent's membership be reinstated. Aggrieved, the applicant filed an appeal against the award of the tribunal to the High Court. The High Court, had on 2 April 2009, allowed the applicant's appeal and set aside the whole award of the tribunal made on 17 May 2004 with costs. The respondent then appealed to the Court of Appeal. The Court of Appeal, had on 8 July 2010, unanimously allowed the respondent's appeal. Hence, this application in encl. 2(a) for leave to appeal was made to this court.

Enclosure 5(a)

[3] The preliminary objection raises the issue of whether in an appeal from the tribunal under the CSA, the High Court, was exercising its original jurisdiction or its appellate jurisdiction. This is crucial to the case because if the High Court was exercising its appellate jurisdiction, the matter should end in the Court of Appeal and this court does not have the jurisdiction to hear the application in encl. 2(a). This calls into consideration as to how a right of appeal arises in the present case.

Right Of Appeal

[4] Generally, a right of appeal is conferred by statute. It is a creature of statute. The case of *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt* [1995] 3 CLJ 485 FC at 485 is authority for this proposition. In that case, Edgar Joseph Jr. FCJ stated that:

> It is elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.

(See also *Pahang South Union Omnibus Co. Bhd. v. The Minister of Labour & Manpower & Anor.* [1981] 1 CLJ 83; [1981] CLJ (Rep) 74).

[5] Similarly, in *Healey v. Ministry of Health* [1954] 2 All ER 449 CA at 453, Morris LJ stated that:

> There can certainly be no implication of a right of appeal. Had it been desired to provide some machinery or procedure for an appeal from the decision of the Minister, it could have been done. Any such prescribed appeal might or might not have been an appeal to the courts. Questions as to which methods for determining rights are the most desirable raise issues of policy which are for Parliament to decide; but the court cannot invent a right of appeal where none is given. The courts will not usurp an appellate jurisdiction where none is created.

[6] The jurisdiction of the Federal Court to determine appeals is governed by art. 128(3) of the Federal Constitution, which reads:

> 128. Jurisdiction of Federal Court.
>
> (3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

[7] In civil matter, this is governed by s. 96(a) of the CJA, which reads:

> 96. Conditions of appeal.
>
> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[8] In the recent case of *Terengganu Forest Products Sdn. Bhd. v. Cosco Container Lines Co. Ltd. & Anor. & Other Applications* [2011] 1 CLJ 51, Zaki Tun Azmi, CJ in applying s. 96(a) of the CJA ruled that:

> **It is also clear from the section that the cause or matter must have been decided by the High Court in its original jurisdiction.** The legal issue posed to this court may have arisen from the decision of the High Court in the exercise of its original jurisdiction or in the Court of Appeal in the course of its giving its judgment or making its order under the first limb and must be questions of general principles. (emphasis added)

[9] It follows, therefore, that if the decision of the High Court does not arise from the exercise of its original jurisdiction, it will not fall within the ambit of s. 96(a) of the CJA. In this regard, we would refer to the unreported decision of this Court in *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn. Bhd.* (Civil Application No: 08-31-99(S). In that case, the issue was whether the High Court in making a decision on a case stated by the Special Commissioners of Income Tax to the High Court was exercising its appellate jurisdiction as opposed to its original jurisdiction. It was argued for the respondents that s. 96(a) of the CJA could not be invoked and the decision of the High Court in this regard was not appealable to the Federal Court. Learned counsel for the applicant contended that the Special Commissioners of Income Tax in deciding on appeal from the decision of the Director-General of Inland Revenue was not a subordinate court or an inferior court, and that in making decision on matters appealed from the Special Commissioners of Income Tax, the High Court was in fact exercising its original jurisdiction and not its appellate jurisdiction.

[10] Chong Siew Fai CJSS, in delivering judgment of the court in that case stated:

> It is significant to note that in line with the provisions of section 96(a) of the Courts of Judicature Act, 1964, the judgment sought to appeal against in our present case is the judgment of the Court of Appeal and not that of the High Court. That being the case, the pertinent question to consider is not so much as to whether the Special Commissioners constituted a subordinate court or an inferior court but rather whether the judgment of the Court of Appeal sought to appeal against is in respect of a cause or matter

> decided by the High Court in the exercise of its original jurisdiction. In other words, the material point is not so much the status of the Special Commissioners sitting in judgment of the assessment made by the Director-General, but rather the nature of the jurisdiction exercised by the High Court when it heard an appeal from the decision of the Special Commissioners by way of case stated.

[11] After having considered art. 128(3) of the Federal Constitution, s. 96(a) of the CJA and the relevant provision of the Income Tax Act 1967, the Federal Court came to the conclusion that the decision of the High Court was made in the exercise of its appellate jurisdiction and as such it does not come within the ambit of s. 96(a) of the CJA and, therefore, the decision of the Court of Appeal respecting which leave was sought is not appealable to the Federal Court.

[12] In the present case, learned counsel for the applicant contended that the tribunal is not a court. He relied on s. 3 of the Subordinate Courts Act 1948 ("the SCA"), which reads:

> 3. Courts.
>
> (2) There shall be established the following Subordinate Courts for the administration of civil and criminal law:
>
> (a) Sessions Courts;
>
> (b) Magistrates' Courts; and
>
> (c) In West Malaysia only, Penghulu's Courts.

[13] He further submitted that the tribunal is also not regarded as "subordinate court" under the CJA, s. 3 of which provides:

> "subordinate court" means any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court any such court as by any written law has jurisdiction within the local jurisdiction of the High Court.

[14] Since the tribunal is not an inferior court, counsel for the applicant contended that the decision of the High Court in this case was made in the exercise of its original jurisdiction and, therefore, it is appealable to the Federal Court.

[15] In response, counsel for the respondent submitted that the tribunal was established pursuant to s. 83 of the CSA and its powers are clearly set out in s. 83(5) of the CSA. He also contended that, the chairman of the tribunal is required to be a member of the judicial and legal service. On that premise, he submitted that by the scheme of the CSA, the tribunal is indeed an "inferior court". More importantly, he submitted that the applicant itself, in invoking s. 83(7) of the CSA, has proceeded by way of appeal under O. 55 of the Rules of High Court 1980 ("the RHC") and not by way of the judicial review under O. 53 of the RHC.

[16] Having considered the arguments of parties, we are of the opinion that whether the co-operative tribunal is a subordinate or an inferior court is not in issue. The critical issue is whether the High Court was exercising its original or appellate jurisdiction.

[17] In the present case, the appeal by the applicant to the High Court was made pursuant to the provision of s. 83(7) of CSA which states:

> S.83(7). Tribunal.
>
> (7) Any party aggrieved by the award of a tribunal may appeal therefrom to the High Court in accordance with the provisions of the rules of court applicable thereto.

The appeal was instituted by the applicant, by way of originating motion, pursuant to O. 55 r. 13 of the RHC, which reads:

> O.55 r.13. Appeal from person or body of persons.
>
> (1) Where under any written law an appeal lies from any decision of any person or body of person to the High Court such appeal shall be made to the High Court in the State where the decision was given by motion setting out the grounds of appeal, supported by affidavit and, if the Court so directs at the hearing, by oral evidence.
>
> (2) Unless otherwise provided by any written law, such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date.
>
> (3) Unless otherwise provided by any written law, notice of the motion shall be served on the respondent in such appeal or where the respondent is a body of person, on the secretary, registrar or such other officer of that body of persons.

Hence, the matter came before the High Court by way of an appeal. It follows, therefore, that this application could not come within the ambit of s. 96(a) of the CJA.

Conclusion

[18] For the above reasons, we uphold the preliminary objection raised herein and accordingly the application in encl. 2(a) is struck out with costs. We now invite parties to address us on the amount of costs to be awarded to the respondent.